IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 307

THE CLARK ESTATE COMPANY, a Corporation,
Petitioner,

vs.

ALONZO H. GENTRY, COMMERCE TRUST COMPANY, a Corporation, ESTHER REYBURN and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, CO-EXECUTRIX AND CO-EXECUTOR OF THE ESTATE OF ROSCOE REYBURN, DECEASED,

Respondents.

PETITIONER'S REPLY BRIEF.

Respondents have filed their answer brief in opposition to our petition for writ of certiorari herein. They certainly would have cited a decision of the Missouri appellate courts sustaining the impossible decision of the Missouri Supreme Court rendered in this cause, holding the Statute of Limitations had barred the cause of action to recover damages for fraudulent conspiracy during the pendency of the action, which has never been abated, if there had been any such decision which they could cite. The cause of action for conspiracy was not barred until

5 years after the last overt act which the petition charges was recently committed (see Petition, Tr. pp. 17-18, our Brief, p. 31). They are still citing *Cleveland* v. *Gore Bros.*, 14 Cal. App. 2nd 681, 58 P. 2nd 931, which we conclusively showed in our former brief did not in any way decide the point involved here. Instead of relying on a Missouri decision they rely on a California case that is not in point, and that has no application whatever to the question presented here as to whether the amended petition was a departure or was a continuation of the same cause of action and whether the Statute of Limitations barred the action while the suit was pending although no abatement was ever had.

In respondents' answer brief they state: (page 13)

> "In all said cases cited by petitioner there is not a single case in which, as in the instant case, the question ruled by the court was whether a non-existing corporation whose charter had theretofore been forfeited under applicable statutes, could validly institute action in its corporate name, remain in a state of forfeiture for a period beyond the applicable Statute of Limitations and thereafter by obtaining rescission of such forfeiture, breathe life into the action and instill it with validity, and thus overcome the bar of the applicable Statute of Limitations."

Reference to our brief shows we cited many cases in Missouri and other jurisdictions, including California, deciding the very question involved here, that a suit filed by a party having no title or right to maintain the suit can be amended after the Statute of Limitations has barred the action, substituting the real party in interest having the right to sue on the cause of action, who takes over the suit free from any bar of limitations. It is no answer to such cases to say that none of them are cases

where a corporation brought suit while its charter was forfeited. That is the same as saying that a cited case does not apply because the cited case involves a bay horse while the pending case involves a gray horse.

It is no answer to the sound ruling and logical reasoning of the Missouri Supreme Court in *Lilly, et al.* v. *Tobbein, et al.*, 103 Mo. 477, 15 S.W. 618, 23 Am. St. Rep. 887, cited and quoted in our former brief, l.c. p. 21, *et seq.*, and no answer to the numerous other cases cited, including cases holding that the Board of Directors and officers of the dissolved corporation can be substituted after the bar of the Statute of Limitations. In *Lilly* v. *Tobbein, supra*, the Statute of Limitations barred the cause of action before the amended petition was filed substituting the real party having the right to sue, and in *Hackett* v. *Van Frank*, 119 Mo. App. 648, 96 S.W. 247, (cited l.c. 26) the Statute of Limitations had barred the cause of action before the amendment, and in *Wilson Motor Co.* v.*Hoover*, 222 Mo. 570, 293 S.W. 61 (cited l. c. 27), an amendment was allowed substituting the officers and board of directors of the dissolved corporation. That argument is also no answer to the many cases in point cited from other jurisdictions including the California cases cited in said brief.

It is now clear from respondents' brief that the only purported authority for the impossible decision of the Missouri Supreme Court is the California case of *Cleveland* v. *Gore Bros.*, 58 Pac. 2nd 931, which case is, to any lawyer, obviously not in point as conclusively shown in our previous brief, loc. cit. page 30. It is also an obvious fact that there is not one authority in Missouri to support the impossible decision of the Missouri Supreme Court herein, but that all the prior cases in Missouri where the question here involved is decided are in conflict with, and

contrary to, the decision of the Missouri Supreme Court, filed herein.

If a suit is filed by a party having no title or right to sue, and the law permits an amended petition after the Statute of Limitations has run, substituting the proper party having the right to maintain the suit, and the action is thereby saved from the bar of the Statute of Limitations, it is certainly of no consequence whether Smith or Brown or a black man or a white man, or a dissolved corporation, or an unincorporated society, devoid of legal entity, happens to be the erroneously named plaintiff, who has mistakenly filed the suit on a cause of action belonging to another, which has become barred by limitations before the substitution of the real plaintiff having authority to sue, because that same legal result follows whoever the plaintiff may be. It is a principle of law that is involved, and not the particular identity of the parties. The legal principle applies alike to all parties. As pointed out in our original brief, the only difference between the pending case and the prior Missouri decision is that this case was pending a little longer time, which, of course, cannot change or alter the applicable principle of law.

We respectfully submit that it cannot be due process of law to apply one rule of law in all prior cases and a different and contrary rule of law in petitioner's case holding that a suit to recover damages for fraud and conspiracy is barred by limitations while the suit is pending, notwithstanding the fact the petition alleges overt acts recently committed by the conspirators. (See Tr. l. c. pp. 17 and 18, pars. 14 and 14A).

Respectfully submitted,

CLARENCE C. CHILCOTT,
600 National Fidelity Life Building,
Kansas City, Missouri,
Counsel for Petitioner.